86 1531

No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

DANIEL L. EDWARDS, JR.,
Petitioner,

v.

UNITED STATES OFFICE OF PERSONNEL MANAGEMENT,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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MARCH, 1987

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QUESTIONS PRESENTED

Whether the Civil Service Reform Act of 1978 vested jurisdiction in the United States Court of Appeals for the Federal Circuit to adjudicate cases which were pending before the enactment of that legislation?

Whether a court, which lacks subject matter jurisdiction over an appeal, may nonetheless dismiss that appeal on the merits on a basis never raised by the parties at any stage of the proceeding?

PARTIES TO THE PROCEEDING

Petitioner in this suit is Daniel L. Edwards, Jr., of Dayton, Ohio. The Respondent is the United States Office of Personnel Management.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Petitioner Daniel L. Edwards, Jr. petitions this Court for a writ of certiorari to the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The Court of Appeals for the Federal Circuit's order entered on June 11, 1986 dismissing Mr. Edwards' appeal, *see* App. A *infra* at 1a, is not reported. Similarly, that court's November 24, 1986 order affirming the dismissal on reconsideration is unreported. *See* App. B *infra* at 4a. The decisions of the United States Merit Systems Protection Board, from which judicial review was sought, are reproduced at App. C and D *infra* at 9a-15a.

JURISDICTION

The judgment of the court of appeals (App. E *infra* at 16a) was entered on December 2, 1986. On February 11,

1987 Mr. Edwards requested, and on February 13, 1987 this Court granted, until March 24, 1987 within which he might submit this petition for certiorari. This petition is, accordingly, filed within the time allowed by law. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 205 of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1138 (1978), as amended by Section 144 of the Federal Courts Improvement Act, Pub. L. No. 97-164, 96 Stat. 45 (1982), and codified at 5 U.S.C. § 7703(b)(1) provides:

> Except as provided in paragraph (2) of this subsection, a petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit. Notwithstanding any other provision of law, any petition for review must be filed within 30 days after the petitioner received notice of the final order or decision of the Board.

Section 902(b) of the Civil Service Reform Act of 1978, 92 Stat. 1224 (1978) provides:

> No provision of this Act shall affect any administrative proceedings pending at the time such provision takes effect. Orders shall be issued in such proceedings and appeals shall be taken therefrom as if this Act had not been enacted.

Section 1201.191(b) of Title 5, Code of Federal Regulations, provides:

> *Administrative proceedings and appeals therefrom.* No provision of the Civil Service Reform Act shall be applied by the Board in such a way as to affect any administrative proceeding pending at the effective date of such provision. "Pending" is considered to encompass existing agency proceedings, and ap-

peals before the Board or its predecessor agencies, that were subject to judicial review or under judicial review on January 11, 1979, the date on which the Act became effective. An agency proceeding is considered to exist once the employee has received notice of the proposed action.

STATEMENT

This case arises out of Mr. Edwards' ongoing quest to rectify an injustice done to him twenty-five years ago. In November of 1961, Mr. Edwards initiated the process to obtain a disability annuity from the Civil Service Commission. Because of ill will and animosity borne against him by his superior officers, his employing agency (the Department of the Air Force) never completed those portions of the retirement application it was required to submit. Accordingly, Mr. Edwards was not granted his disability annuity and ultimately he was removed from his position.

Commencing even before the date of his separation from federal service in 1962 and continuing for approximately eighteen years, Mr. Edwards continuously communicated with the Civil Service Commission and various elected officials concerning the Air Force's improper actions. In early 1980, Mr. Edwards was advised to resubmit his application for a disability annuity, and, in April, 1980, he did so.

The United States Office of Personnel Management ("OPM") denied Mr. Edwards' second application for disability retirement as being untimely filed. At no point did OPM discuss or consider the effect of Mr. Edwards' previous filing. Rather, it held merely that his 1980 application, filed as it was over one year after the date of his separation, was untimely.

Mr. Edwards appealed OPM's decision to the Merit Systems Protection Board ("Board"). The Board held a hearing, at which Mr. Edwards testified and submitted

evidence concerning his original application for a disability annuity filed in 1961. No representative for OPM was present at the hearing; OPM advised the Board that it relied solely upon its determination that the second application was untimely filed.

Notwithstanding Mr. Edwards' testimony and documentary evidence concerning the filing of his initial application, and OPM's failure to offer any countervailing proof, the Board's presiding official concluded that Mr. Edwards had not, in fact, submitted an application for disability retirement in 1961. *See* App. D *infra* at 12a-14a. Mr. Edwards petitioned the full Board for review of the initial decision, but the Board, by decision of May 3, 1982, denied Mr. Edwards' petition and thus affirmed the initial decision. *See* App. C *infra* at 9a.

Because Mr. Edwards had raised an allegation of discrimination prohibited by section 717 of the Civil Rights Act of 1964, as amended, he sought judicial review of the Board decision in the United States District Court for the Southern District of Ohio. *See* 5 U.S.C. § 7703 (b) (2). Thereafter, Mr. Edwards dismissed his discrimination allegations and obtained a transfer of this matter to the Federal Circuit pursuant to 28 U.S.C. § 1631.

After this matter was transferred to the Federal Circuit, Mr. Edwards concluded that the court lacked subject matter jurisdiction over his claim and thus the action was improvidently transferred. Accordingly, before briefing the merits of his case to the Federal Circuit, Mr. Edwards moved that court to transfer the action to the District Court for the District of Columbia.[1]

The court below, acting on Mr. Edwards' motion to transfer, and without the benefit of briefing by the parties, concluded that his appeal was untimely and dis-

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[1] Mr. Edwards' chose to transfer the action to the District of Columbia District rather than the Southern District of Ohio because all counsel and OPM are located in Washington, D.C.

missed it on the merits. *See* App. A *infra* at 1a-2a. Mr. Edwards sought reconsideration of that decision, arguing that the court lacked jurisdiction to adjudicate the merits of the appeal and demonstrating a dispositive error made by the court by delving into areas which had not been briefed.[2] By letter of September 26, 1986, the court invited the parties to brief the issue of laches, asking them to assume that Mr. Edwards had in fact filed an application with the Civil Service Commission in 1961. *See* App. F *infra* at 18a. Mr. Edwards responded to this letter, asserting that as the court lacked subject matter jurisdiction over his appeal, it could not dispose of the case on nonjurisdictional issues, such as laches, and that, even if it had jurisdiction, it nonetheless could not consider the issue of laches as that defense had not been raised below and thus there was no factual predicate upon which it could base a decision.

On November 24, 1986, the court below affirmed its dismissal of Mr. Edwards' appeal on the merits. *See* App. B *infra* at 4a. The court refused to address the jurisdictional issue raised by Mr. Edwards, and, notwithstanding that it had no factual predicate to balance the competing equities, and, indeed, that this defense had never been raised below, the court dismissed Mr. Edwards' appeal as barred by laches. This petition for certiorari timely followed.

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[2] In its June 11, 1986 order dismissing Mr. Edwards' appeal, the court below held that Mr. Edwards' application for a disability annuity "was never personally filed with the Commission." App. A *infra* at 2a. In his motion for reconsideration, Mr. Edwards not only identified that portion of the record which evinced his filing with the Civil Service Commission, but further he established that under then controlling law his burden was only to file with his employing agency, not the Civil Service Commission. *See* App. B at 5a.

REASONS FOR GRANTING THE PETITION

This case presents issues of substantial public importance concerning the interpretation and operation of the Civil Service Reform Act. Moreover, this case calls upon the Court to reaffirm an established rule of appellate practice ignored by the court below: a court will not consider on appeal issues which were not addressed below. The Federal Circuit's refusal to address the jurisdictional question, and its reliance on facts not found in the record to fashion a reason to dismiss the case were inappropriate. The magnitude of that court's errors alone warrants plenary review by this Court.

1. In 1978, Congress enacted the Civil Service Reform Act to restructure and clarify the laws concerning employment in the federal government. A key provision of that legislation, denominated the "Savings Provision," provided that those matters which were "pending" on the date of the enactment of the Reform Act would continue to be governed by the law then in effect. Specifically, as it applies here, the Savings Provision provides:

> No provision of this Act shall affect any administrative proceeding pending at the time such provision takes effect. Orders shall be issued in such proceedings and appeals taken therefrom as if this Act had not been enacted.

5 U.S.C. § 1101 note (1982). Thus, Congress directed that the Reform Act was not to apply to those cases which had arisen before its enactment.

The Merit Systems Protection Board has promulgated a regulation to implement the Savings Provision and to define "pending" as it appears in the Reform Act. Specifically, 5 C.F.R. § 1201.191(b) provides:

> *Administrative proceedings and appeals therefrom.* No provision of the Civil Service Reform Act shall be applied by the Board in such a way as to affect any administrative proceeding pending at the effective date of such provision. "Pending" is considered

> to encompass existing agency proceedings, and appeals before the Board or its predecessor agencies which were subject to judicial review or under judicial review on January 11, 1979 . . . An agency proceeding is considered to exist once the employee has received notice of the proposed action.

Accordingly, the Board has construed the Savings Provision to preclude application of any provision of the Reform Act to personnel actions of which the employee was notified before January 11, 1979.

The courts have had little difficulty construing the Savings Provision. As did the District of Columbia Circuit in *Kyle* v. *Interstate Commerce Comm'n*, 609 F.2d 540, 542 (D.C. Cir. 1980), in which the court deferred to the Board's construction of the Savings Provision, other courts have uniformly refused to apply provisions of the Reform Act to "old systems" cases. *See, e.g., Glenn* v. *Merit Systems Protection Board*, 616 F.2d 270, 271 (6th Cir. 1980); *Ellis* v. *Merit Systems Protection Board*, 613 F.2d 49, 51 (3d Cir. 1980); *Motley* v. *Secretary of the Army*, 608 F.2d 122, 123 (5th Cir. 1980). Indeed, to the extent any difference of opinion exists in the construction of the Savings Provision, it is in the limited area of the application of the Back Pay Act, 5 U.S.C. § 5596. *See Wilson* v. *Turnage*, 750 F.2d 1086 (D.C. Cir. 1984) (allowing application of attorney fee provision of the Back Pay Act), *vacated and transferred*, 755 F.2d 967 (D.C. Cir. 1985); *Wilson* v. *Turnage*, 791 F.2d 151, 156 (Fed. Cir. 1986) (holding the Back Pay Act inapplicable.) *See, also, Zeizel* v. *Price*, 784 F.2d 405, 407 (D.C. Cir. 1986).

Although the court below did not explicitly so hold, this case is an "old system" case which was pending before the date of the enactment of the Reform Act.[3] Mr. Ed-

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[3] The court below justified dismissal of Mr. Edwards' appeal alternatively as a Reform Act case and as an "old system" case, without deciding which it was. *See* App. B *infra* at 6a-7a.

wards filed an application for disability retirement with his employing agency in November, 1961 and with the Civil Service Commission in early 1962. These acts initiated the "administrative proceedings" which were "subject to judicial review" before the enactment of the Reform Act, and, accordingly, these acts deprived the Federal Circuit of jurisdiction over Mr. Edwards' appeal.[4]

2. Notwithstanding that it lacked jurisdiction, and, indeed, implicitly recognizing this lack of jurisdiction (*see* App. B *infra*, at 6a), the court below nonetheless refused to transfer the appeal to a court competent to entertain it. Instead, the Federal Circuit dismissed Mr. Edwards' case on nonjurisdictional grounds. Yet not only did the court go beyond the threshold jurisdiction presented to it, but it predicated its decision on an argument never raised by the parties at any stage of the proceeding. In so doing, the court below plainly arred.

The court below concluded that Mr. Edwards' claims were barred by the equitable doctrine of laches. It is axiomatic, of course, that statutes of limitations (and equitable time limitations imposed by the doctrine of laches) are not jurisdictional in nature. *Zipes* v. *Trans World Airlines*, 455 U.S. 385, 393 (1982). Thus, laches, unlike subject matter jurisdiction, is not an issue which may be raised at any time, by any party or the court.

More fundamentally, the court below erred by dismissing Mr. Edwards' appeal on the basis of issues never presented below, either as factual or legal matters. To

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[4] Congress amended the Reform Act with the Federal Courts Improvement Act to provide that judicial review of all cases heard by the Board under 5 U.S.C. § 7701 would lie exclusively in the Federal Circuit. *See* 5 U.S.C. § 7703(b). This amendment did not bring "old system" cases within the exclusive province of the Federal Circuit, however, for under the Savings Provision the Board did not hear such cases under 5 U.S.C. § 7701. Accordingly, the Federal Courts Improvement Act did not give the court below jurisdiction to entertain Mr. Edwards' appeal.

be sure, the Federal Circuit couched its laches determination in terms of whether a transfer would be "in the interest of justice" within the meaning of 28 U.S.C. § 1631. But this does not alter the fact that at no time was Mr. Edwards' offered the opportunity to present evidence bearing on the issue of laches—the reasonableness of any delay, whether the government actively misled him, whether the government was even prejudiced by the delay. OPM never raised the defense of laches, and presumably it elected not to do so for some reason. For the court to raise this issue, on its own motion and without the benefit of any briefing or development of the evidentiary record, was improper.

The Federal Circuit itself has repeatedly held that parties will not be heard to argue on issues not presented in the lower forum. *James* v. *Federal Energy Regulatory Comm'n*, 755 F.2d 154, 156 (Fed. Cir. 1985); *Rowe* v. *Merit Systems Protection Board*, 802 F.2d 434, 437 (Fed. Cir. 1986) ("We are not a trial court and can function only at the appellate level.") Yet here the court has ignored its own admonition by reaching out and finding a basis to support its improvident dismissal. Since it had no jurisdiction over the subject matter of Mr. Edwards' appeal, it had no business dismissing that claim on nonjurisdictional grounds. Even if the court were not required under 28 U.S.C. § 1631 to transfer this case to the district court, and we submit that in the interest of justice it was, nonetheless it should have dismissed the case on jurisdictional grounds only, so that the court with subject matter jurisdiction, and a full factual record, could consider any issue of laches raised by the government. By so abandoning its role as adjudicator and instead adopting the role of advocate, the court below erred. This Court cannot sanction that error.

CONCLUSION

For the foregoing reasons, Mr. Edwards' petition for a writ of certiorari to the United States Court of Appeals for the Federal Circuit should be granted.

Respectfully submitted,

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MARCH, 1987

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Appeal No. 86-516

DANIEL L. EDWARDS,
Petitioner,

v.

OFFICE OF PERSONNEL MANAGEMENT,
Respondent.

ON MOTION TO TRANSFER

[Filed June 12, 1986]

Before MARKEY, *Chief Judge,* FRIEDMAN, and RICH, *Circuit Judges.*

ORDER

Daniel L. Edwards (Edwards) appealed from a decision of the Office of Personnel Management (OPM) denying his application for disability annuity as untimely. Edwards appealed the board's decision to the District Court for the Southern District of Ohio in early 1982. By agreement, the parties transferred the case to this court on October 3, 1985. Edwards now moves to transfer this appeal again, this time to the United States District Court for the District of Columbia.

The basis for the motion is that this is an "old system" case, *i.e.*, one alleged to have been pending on January 11, 1979, the effective date of the Civil Service Reform Act (CSRA), and therefore outside the jurisdiction of this court. Pub. L. 95-454, § 902(b) (1978).

Edwards alleges that he filed an application for disability annuity with the Air Force in 1961 and that the Air Force refused to process and forward his application. Edwards does not, however, allege that he challenged that "refusal." Assuming the truth of Edwards' allegation, his claim was of no force or effect because it was never personally filed with the Commission as required by 5 C.F.R. § 29.5(c) and Pub. L. No. 70-854, 7(b) (70 Stat. 750 (1956)). See also 5 U.S.C. § 8337 (b). No judicially reviewable agency proceedings were in existence on January 11, 1979, and the claim was clearly not "pending" on January 11, 1979. Edwards' alleged application, therefore, cannot render this an "old system" case. Accordingly, this court has jurisdiction.

On December 15, 1981 the board held that Edwards' first application for disability retirement was filed not with the Commission in 1961, but with OPM on April 29, 1980. It therefore sustained OPM's finding that Edwards' claim of April 29, 1980, coming some 20 years after discharge, was untimely. See 5 U.S.C. § 8337(b) (claim for annuity must be filed within one year of discharge).

Edwards' claim being without question untimely, no basis exists for either transfer or maintenance of this appeal.

Accordingly, IT IS ORDERED:

(1) The motion to transfer is denied.

(2) The appeal is dismissed as being without any possible foundation.

11 June 86
Date

FOR THE COURT

/s/ Howard T. Markey
HOWARD T. MARKEY
Chief Judge

cc: Michael J. Kator, Esq.
Richard C. Brooks, Esq.
Michael T. Paul, Esq.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Appeal No. 86-516

DANIEL L. EDWARDS,
Petitioner,

v.

OFFICE OF PERSONNEL MANAGEMENT,
Respondent.

ON MOTION

Before MARKEY, *Chief Judge,* FRIEDMAN, and RICH, *Circuit Judges.*

ORDER

On June 11, 1986, this Court denied Edwards' motion to transfer and dismissed the appeal as being without foundation. Edwards filed a motion for reconsideration and OPM filed a response. Also, in response to the Court's request, each party has addressed the effect of Edwards' extensive delay in pursuing his appeal rights.

We have reconsidered our earlier order in light of the parties' submissions, but we deny Edwards' request to reinstate and to transfer the appeal.

Though Edwards applied to OPM for a disability annuity in 1980, he alleges that he filed an earlier application with the Air Force in 1961 which the Air Force

refused to process and forward to the Civil Service Commission (CSC). Edwards argues that his claim was still pending on January 11, 1979, the effective date of the Civil Service Reform Act, and therefore this is an "old case" outside the jurisdiction of this Court. Pub. L. 95-454 § 902(b) (1978). However, on December 15, 1981, the Merit Systems Protection Board (MSPB) held that Edwards' application was filed not in 1961 but in 1980, nearly 20 years after discharge and, hence, was untimely. *See* 5 U.S.C. § 8337(b) (claim for annuity must be filed within one year of discharge). Edwards sought relief from that MSPB decision in the District Court for the Southern District of Ohio in early 1982 but, per agreement of the parties, the case was transferred here in 1985.

In the June 11, 1986 Order, this Court concluded, as had the MSPB, that even if Edwards filed a 1961 application, he failed to file it with the CSC as required by statute and regulation; instead, he filed it with the agency. Consequently, concluded the Court, there were no judicially reviewable proceedings as of January 11, 1979, and, hence, this was not an "old system" case and this Court had jurisdiction. The Order then held that, because Edwards did not file until 1980, it was without question untimely. Hence, the appeal was dismissed.

Underlying the June 11 Order is the view that Edwards was required to file personally with the CSC; filing with the agency was insufficient. In his Motion for Reconsideration, Edwards cites provisions of the Federal Personnel Manual (FPM) allegedly allowing him to file the application with the agency, with the agency incurring the obligation to forward it to the Commission. Edwards also contests the Order's statement that he never challenged the agency's alleged refusal to forward the application to the CSC. He cites transcript testimony to the effect that he sent an appeal to the CSC on January 12, 1962. However, even if Edwards' allegations

are true, our dismissal and refusal to transfer are compelled by Edwards' substantial delay in pursuing any rights he may have had.

This case is either an "old case" or a "new case." If it is a "new case," *i.e.*, if there was no claim pending on January 11, 1979, then Edwards' claim is without question untimely because Edwards waited some 19 years before filing for disability. Hence, the appeal would have to be dismissed. Moreover, transfer would be inappropriate because jurisdiction over a "new case" does not lie in the district court.

If this is an "old case," as Edwards maintains, we would not have jurisdiction and, again, dismissal would be warranted. Though 28 U.S.C. § 1631 allows us to transfer cases to the district court, we can do so only if the transfer is in the "interest of justice." *See, e.g., Bray v. United States*, 785 F.2d 989, 993 (Fed. Cir. 1986). *Accord, In re Exclusive Industries Corp.*, 751 F.2d 806, 809 (5th Cir. 1985); *Hempstead Cty. & Nevada Cty. Project v. USEPA*, 700 F.2d 459, 462 (8th Cir. 1983). *Cf. Goewey v. United States*, 612 F.2d 539 (Ct. Cl. 1979); *Williams Int'l. Corp. v. U.S.*, 7 Cl. Ct. 726 (Cl. Ct. 1985); *Little River Lumber Co. v. United State*, 7 Cl. Ct. 492 (Cl. Ct. 1985). That "interest" would not be promoted by transfer here.

At some reasonable point in time after Edwards allegedly protested to the Air Force and "appealed" to the CSC (early 1962), he should have realized that neither the agency nor the CSC would act on his claim. We need not define that point in time, precisely, because Edwards waited until April, 1980 to pursue before OPM whatever rights he had—some 18 or 19 years after his "appeal" to the Air Force and CSC. Moreover, it was not until 1982 that Edwards sought relief in district court. Edwards had only 6 years under 28 U.S.C. § 2401 (a) to protest in district court the CSC's alleged original

refusal to process his claim. *See, e.g., Oppenheim v. Campbell*, 571 F.2d 660 (D.C. Cir. 1978); *Saffron v. Department of the Navy*, 561 F.2d 938 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1033 (1978); *United States v. Sams*, 521 F.2d 421 (3rd Cir. 1975). That 6 year period clearly expired at some point between 1962 and 1980. Indeed, Edwards did not sue in district court until 1982, some 20 years after he was allegedly wronged and certainly more than 6 years after he should have become aware of any wrong.

The "interest of justice" is ill served by allowing Edwards to wait as long as he did to assert his rights and then transferring his case to district court where his claim would be denied on statute of limitations grounds. As stated in *Goewey v. United States*, 612 F.2d 539, 541 (Ct. Cl. 1979), "[t]ransfer of a claim that is barred by the statute of limitations would not serve th[e]se interests [of justice]."* *See also Bray v. United States*, 785 F.2d 989, 993-94 (Fed. Cir. 1986); *Dancy v. United States*, 668 F.2d 1224, 1228-29 (Ct. Cl. 1982) ("We also deny plaintiff's request to transfer his suit to district court, because any tort claim he might have brought is now time-barred."); *Little River Lumber Co. v. United States*, 7 Cl. Ct. 492 (Clms. Ct. 1985) ("a case should not be transferred or retransferred to a district court if it most probably would be a futile act."). Moreover, Edwards' original accord two years ago to transfer the case from district court here makes transfer "in the interest of justice" even less compelling.

Edwards argues that the statute of limitations is not a jurisdictional issue. Whether it is "jurisdictional" is irrelevant to our determination that the interests of justice are not served in this case by transferring a time

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* *Goewey* involved 28 U.S.C. § 1506 (1976), which allowed cases improperly filed in the Court of Claims to be transferred to district court in "the interest of justice."

barred claim. Edwards cites *Zipes v. Trans World Airlines*, 455 U.S. 385 (1982), but that action involved a suit against a private party. In suits against the government, the statute of limitations is jurisdictional. *See, e.g., Soriano v. United States*, 352 U.S. 270, 271 (1957); *Jones v. United States*, 801 F.2d 1334, 1335 (Fed. Cir. 1986); *Bray v. United States*, 785 F.2d 989, 992 (Fed. Cir. 1986).

FOR THE COURT

/s/ Howard T. Markey
HOWARD T. MARKEY
Chief Judge

24 Nov. 86

Date

cc: Michael J. Kator, Esq.
Michael T. Paul, Esq.

APPENDIX C

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

Docket Number CH831L8110611

DANIEL L. EDWARDS, JR.

v.

OFFICE OF PERSONNEL MANAGEMENT

ORDER

Having fully considered appellant's petition for review of the initial decision issued on December 15, 1981, and finding that it does not meet the criteria for review set forth at 5 C.F.R. § 1201.115, the Board hereby DENIES the petition.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five (5) days from the date of this order. 5 C.F.R. § 1201.113(b).

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. § 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

FOR THE BOARD:

May 3, 1982

(Date)

/s/ Robert S. Taylor

Washington, D.C.

APPENDIX D

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
CHICAGO REGIONAL OFFICE

Decision Number: CH831L8110611

IN THE MATTER OF:

DANIEL L. EDWARDS, JR.

v.

OFFICE OF PERSONNEL MANAGEMENT

Date: December 15, 1981

INTRODUCTION

By petition filed on August 28, 1981, Mr. Daniel L. Edwards, Jr., appealed from an August 21, 1981 reconsideration decision issued by the Office of Personnel Management (OPM), Washington, D.C. This reconsideration decision sustained the May 11, 1981 decision denying the appellant's April 29, 1980 application for disability retirement.

BACKGROUND

The appellant was formerly employed by the Department of the Air Force, Wright-Patterson Air Force Base, Dayton, Ohio. On April 23, 1962, the appellant was involuntarily separated from government service (Tr. at 6). At the time of his separation, the appellant withdrew his deposit from the Civil Service Retirement Fund (Appellant Exhibit 1). OPM's file showed that for approxi-

mately eighteen years the appellant consistently corresponded with elected officials and the United States Civil Service Commission (now OPM) concerning improper actions by the Department of the Air Force and alleged discrimination against him on the basis of religion. The appellant, on April 29, 1980, made application for a disability retirement. OPM, on May 11, 1981, issued a decision to disallow the appellant's application because it was not filed in a timely manner. However, OPM's decision erroneously informed the appellant to appeal to the Merit Systems Protection Board (Board) rather than request reconsideration within OPM, and an appeal was submitted to the Board. On July 6, 1981, OPM moved that the Board dismiss the appellant's appeal because it was premature. In an initial decision dated July 23, 1981 (CH831L8110428), the appellant's premature appeal was dismissed without prejudice. OPM, on August 21, 1981, issued a reconsideration decision sustaining the initial decision of May 11, 1981 to disallow the appellant's application for a disability retirement because it was not timely filed. After OPM's reconsideration decision, the appellant, on August 28, 1981, again appealed to the Board claiming that OPM's decision was improper because he filed a November 2, 1961 application for a disability retirement with the Department of the Air Force, Wright-Patterson Air Force Base and that the Wright-Patterson Air Force Base refused to process and forward his application to the United States Civil Service Commission in Washington, D.C. (Tr. at 27, 28). The appellant, however, did not claim that he was unable to submit a timely application due to mental incompetence (Tr. at 22).

JURISDICTION

Federal employees have the right to appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation. 5 U.S.C. 7701(a) (1980). 5 U.S.C. 8347(d) provides a

statutory right of appeal to the Board from OPM's administrative actions or orders affecting civil service retirements. The OPM regulations provide for a direct appeal to the Board from a final OPM reconsideration decision concerning disability retirement. 5 C.F.R. 831.1205 (1981).

ANALYSIS AND FINDINGS

Under the provisions of 5 U.S.C. 8337(b) (1980) (original version in Act of July 31, 1956, Pub. L. No. 70-854, 7(b), 70 Stat. 750), OPM may allow a claim for disability retirement annuity ". . . only if the application is filed with the Office before the employee . . . is separated from the service or within 1 year thereafter." This section authorizes OPM to waive the time limit for applicants who were unable to file within the time frame due to mental incompetency. In allocating the burden of proof in this appeal, I note that the Board has held, in *Chavez v. Office of Personnel Management*, MSPB Order No. DA831L09003 (May 28, 1981), that in an appeal from an OPM denial of a voluntarily-initiated application for disability retirement the employee bears the burden of persuasion by a preponderance of the evidence that he is entitled to a disability retirement. *Id.* at 20. The current situation is analogous to *Chavez* because OPM determined that the appellant did not have a statutory entitlement to file a voluntary application for a disability retirement. The current situation is also analogous to the Board's regulation placing the burden upon the appellant to show that an attempted appeal was filed in a timely manner or that an attempted appeal is within the Board's appellate jurisdiction. *See* 5 C.F.R. 1201.56 (a)(2) (1981). The foregoing leads me to the conclusion that the appellant bears the burden of persuasion by a preponderance of the evidence that he filed an application for a disability retirement in a timely manner.

With respect to the appellant's claim that he filed an application for disability retirement in November of 1961,

the appellant testified that he filed an application for a disability retirement on November 2, 1961, and that his application was ". . . disapproved and held in abeyance by Major James Chatfield" (Tr. at 6). The appellant explained that he had a conflict with Major Chatfield because he had refused to contribute money to a church charity (Tr. at 6). The appellant further explained that he had a November 10, 1961 meeting concerning the failure of the Department of the Air Force to process his application for disability retirement and that during this meeting he was harassed and badgered by Colonel Westbrook and Major Chatfield (Tr. at 11). The appellant added that an Air Force physician refused to examine him and that Major Chatfield contacted his family physician concerning his medical condition (Tr. at 15). The appellant's testimony was supported by three letters of protest dated November 23, 1961 (Appellant Exhibit 1), April 16, 1962 (Appellant Exhibit 4), and April 21, 1962 (Appellant Exhibit 3) to various officials within the Department of the Air Force concerning delays in processing his application for a disability retirement. The appellant's testimony, however, was not supported by a copy of the November 2, 1961 application for a disability retirement. Furthermore, the appellant's testimony was not supported by any testimony or statements from any individual that had personal knowledge of the existence of the appellant's November 2, 1961 application for a disability retirement. Although the appellant's evidence was consistent and detailed, I must be cognizant of the fact that it is virtually impossible to disprove the appellant's claims due to the passage of time. I also must be cognizant of the fact that for the appellant's testimony to be true at least two military officers had to engage in misconduct (i.e. deliberate failure to process an application for disability retirement) to spite the appellant for failure to give money to a church charity. In brief, the appellant's claim that approximately eighteen years ago

that the Department of the Air Force refused to process his application for a disability retirement is only supported by the appellant's unsubstantiated testimony and letters. Since the appellant's claims are not credible, I find that the appellant did not submit a disability retirement application until 1980.

Although the appellant emphasized that he filed an application for a disability retirement within his former employing agency, 5 U.S.C. 8337(b) (1980) requires that an application be filed with one year with *OPM* (formerly the United States Civil Service Commission) rather than filed within an employee's agency (emphasis added). The only provision for a waiver of the one year requirement is mental incompetence. The appellant, however, is not claiming that his application for a disability retirement was delayed due to mental incompetence. In analyzing this appeal, I note that there is Board precedent for a finding that OPM's administrative discretion in waiving the statutory one year requirement is limited to cases of mental incompetence by the applicant. *See In re Shinko*, 1 MSPB 327 (1980). After reviewing all of the evidence and the applicable statute, I find it more likely to be true than not true that the appellant did not submit an application for a disability retirement in a timely manner. Since the appellant has failed to meet his burden of persuasion, I will sustain OPM's reconsideration decision. *See* 5 5U.S.C. 7701(c)(1)(B) (1980); 5 C.F.R. 1201(a)(ii) (1981).

DECISION

The reconsideration decision is affirmed.

This decision is an initial decision and will become a final decision of the Merit Systems Protection Board on Jan. 19, 1982 unless a petition for review is filed with the Board or the Board reopens the case on its own motion.

Any party to this appeal or the Director of the Office of Personnel Management may file a petition for review of this decision with the Merit Systems Protection Board. The petition must identify specifically the exception taken to this decision, cite the basis for the exception, and refer to applicable laws, rules, or regulations.

The petition for review must be filed with the Secretary to the Merit Systems Protection Board, 1120 Vermont Avenue, N.W., Washington, D.C. 20419 no later than thirty-five (35) calendar days after the issuance of the initial decision, cite the basis for the exception, and refer to applicable laws, rules, or regulations.

The Board may grant a petition for review when a party submits written argument and supporting documentation which tend to show that:

(1) New and a material evidence is available that, despite due diligence, was not available when the record was closed; or

(2) The decision of the presiding official is based on an erroneous interpretation of statute or regulation.

Under 5 U.S.C. 7703(b)(1) the appellant may petition the United States court of appeals for the appropriate circuit or the United States Court of Claims to review any *final* decision of the Board provided the petition is filed no more than thirty (30) calendar days after the Board's decision becomes final.

For the Board:

/s/ Douglas G. White
DOUGLAS G. WHITE
Presiding Official

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 86-516

DANIEL L. EDWARDS,
Petitioner,

v.

OFFICE OF PERSONNEL MANAGEMENT,
Respondent.

JUDGMENT

ON APPEAL from the Merit Systems Protection Board
IN CASE No(s). CH831L8110611
This CAUSE having been heard and considered, it is ORDERED and ADJUDGED: Dismissed.

ENTERED BY ORDER
OF THE COURT

/s/ Francis X. Gindhart
FRANCIS X. GINDHART

Dated June 11, 1986

Issued as a mandate: December 2, 1986
Costs; Against, Petitioner.
Printing $2.80
Total $2.80

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

717 Madison Place, N.W.
Washington, D.C. 20430

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September 26, 1986

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2nd Floor, Todd Building
Washington, D.C. 20530

Re: *Edwards v. OPM*, Appeal No. 86-516

Gentlemen:

Before the Court decides petitioner's motion to reconsider the dismissal of the appeal, it would like each party to submit within fourteen (14) days from the date of this letter a brief memorandum on this: Assuming, arguendo, that Mr. Edwards (1) filed an application with the Air Force in November, 1961, (2) sent three letters of protest to the Air Force in November, 1961, and April, 1962, and (3) sent an "appeal" to the Civil Service Commission in April, 1962, what is the effect of this 18-year delay in pursuing in district court or at the MSPB any rights he had? *See, e.g., Oppenheim v. Campbell*, 571 F.2d 660 (D.C. Cir. 1978); *Saffron v. Department of the Navy*, 561 F.2d 938 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1033 (1978); *United States v. Sams*, 521 F.2d 421 (3rd Cir. 1975); 28 U.S.C. § 2401(a).

Very truly yours,

/s/ Francis X. Gindhart
FRANCIS X. GINDHART
Clerk